

STATE OF MICHIGAN
COURT OF APPEALS

ANGELA ROSE PATRICK,

Plaintiff-Appellee,

v

THE CITY OF WARREN,

Defendant/Cross-Plaintiff-Appellant,

and

ZUNIGA CEMENT CONSTRUCTION, INC.,

Defendant/Cross-Defendant.

UNPUBLISHED

August 4, 2009

No. 284291

Macomb Circuit Court

LC No. 2007-001082-NO

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant City of Warren (hereinafter “defendant”) appeals as of right from the Macomb Circuit Court’s order denying its motion for summary disposition pursuant to MCR 2.116(C)(7). The trial court found that there was a question of fact whether the allegedly defective sidewalk or adjoining road was closed at the time of plaintiff’s accident and rejected defendant’s argument that the highway exception to governmental immunity was not applicable as a matter of law. We affirm in part and reverse in part. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was allegedly injured while riding a bicycle on a sidewalk along Eight Mile Road in the City of Warren. A portion of the sidewalk had been removed and new concrete had been poured earlier in the day. At the end of the newly poured sidewalk was a wooden slat used to form the cement, which in turn was adjacent to a ditch and another wooden slat closer to the curb. Plaintiff observed a yellow barrel in the middle of the sidewalk at the east end of the newly poured portion of the sidewalk. She rode her bicycle on the newly poured cement, not knowing that the cement was still wet. She was looking behind her to assess the traffic and did not initially see that the cement ahead of her was missing. When she saw the end of the newly poured sidewalk, plaintiff applied her brakes, the bicycle stopped abruptly in the soft cement, and she was propelled over the handlebars, sustaining injury.

Defendant asserts that the trial court erred in denying its motion for summary disposition because there is no duty under the highway exception to governmental immunity to place warning devices or barriers around ongoing repairs. Defendant does not separately address this issue, but rather presents it in the context of its argument that the highway exception to governmental immunity does not apply when a highway is under repair. We review de novo both a trial court's denial of a motion for summary disposition and issues of statutory construction. *Haliw v City of Sterling Hts*, 464 Mich 297, 301-302; 627 NW2d 581 (2001). “MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.” *Id.*, quoting *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

The highway exception to governmental immunity, MCL 691.1402(1), provides, in pertinent part:

[E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . .

In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160; 615 NW2d 702 (2000), our Supreme Court explained,

The first sentence of the statutory clause, crucial in determining the scope of the highway exception, describes the basic duty imposed on all governmental agencies, including the state, having jurisdiction over any highway: “[to] maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” This sentence establishes the duty to keep the highway in reasonable repair. The phrase “so that it is reasonably safe and convenient for public travel” refers to the duty to maintain and repair. The plain language of this phrase thus states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway “reasonably safe.” [Citations omitted.]

“Highway” is defined in MCL 691.1401(e) to mean, in pertinent part, “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway” “Pursuant to subsection 1402(1), the duty to maintain public sidewalks in ‘reasonable repair’ falls on local governments, including cities” *Haliw, supra* at 303.

Defendant is correct that the duty to maintain and repair a sidewalk does not include a “duty to place warning signs or barriers at ‘points of special hazard’ so as to make the sidewalk ‘reasonably safe.’” *Weakley v City of Dearborn Hts (On Remand)*, 246 Mich App 322, 327-328; 632 NW2d 177 (2001). Therefore, to the limited extent that plaintiff claims that defendant was under a duty to place warning signs or barriers at points of special hazard so as to make the sidewalk reasonably safe, defendant’s motion for summary judgment should have been granted.

Although there is no duty to place barricades at points of special hazard, the placement of barricades can provide evidence of whether a governmental agency suspended its duty to keep a highway in reasonable repair. A governmental agency may suspend its duty to maintain the highway in reasonable repair while the highway is being improved or repaired by closing to public traffic that portion of the street. *Grounds v Washtenaw Co Rd Comm*, 204 Mich App 453, 456; 516 NW2d 87 (1994). See also *Pusakulich v City of Ironwood*, 247 Mich App 80, 85-86; 635 NW2d 323 (2001). Yet although defendant asserts that the highway exception does not apply when a highway is under repair, that limitation applies only when a road is closed to through traffic, not just when the highway is under repair.

Defendant contends that partial closure of the highway is adequate. Further, this Court has recognized that “the status of a sidewalk for purposes of governmental immunity depends on whether the adjacent highway is covered by the exception.” *Pusakulich, supra* at 87. Here, local business owner Kenneth Adamek, whose business was located in front of the sidewalk where plaintiff’s accident occurred, testified that a parking lane or parking easement in front of his store on Eight Mile was closed at the time he left his business for the evening, approximately two hours before the accident. Yet part of the street, apparently including all normal lanes of traffic, was open to the public. Further, there was little proof that barricades or signage had been placed indicating that the sidewalk had been closed. Accordingly, at the very least a question of fact exists regarding whether defendant closed the street to public travel and, therefore, suspended its duty to keep the sidewalk in reasonable repair. In addition, the cases cited by defendant do not indicate that partial closure of a highway parking lane is adequate to entirely suspend the duty to keep the highway in reasonable repair. And regardless, even if we were to accept that partial closure of a parking lane is adequate to suspend the statutory duty in some instances, we are not persuaded that closure of one area necessarily suspends the statutory duty with respect to another area.

Defendant also argues that its duties under the highway exception were suspended because the sidewalk on which plaintiff was riding her bicycle was closed. However, the evidence here showed that a barrel was in the middle of the sidewalk. Adamek stated that he was uncertain whether there was also caution tape attached to the barrel. Plaintiff’s affidavit stated that there was no tape, warning lights, or other warning signal at or near the barrel. The trial court properly found that there was a question of fact whether the sidewalk was closed.

Finally, defendant argues that the highway exception does not apply because the defect, if any, existed for less than three hours. Defendant cites MCL 691.1403:

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

Defendant did not raise this issue below and the trial court did not address it. “Generally, an issue not raised before and considered by the trial court is not preserved for appellate review. However, this Court may properly review an issue if the question is one of law and the facts

necessary for its resolution have been presented.” *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992). The extent to which defendant had notice of the alleged condition of the sidewalk is a factual matter, and the parties did not present evidence on this issue below. Therefore, consideration of this issue is not appropriate and we decline to consider it further.

Affirmed in part and reversed in part. We remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio